UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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PETER PAUL BIRO,

Plaintiff,

v. 11 Civ. 4442 (JPO)

CONDE NAST, et al,

Argument

Defendants.

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New York, N.Y.
May 17, 2013
10:00 a.m.

Before:

HON. J. PAUL OETKEN

District Judge

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(Case called)

THE COURT: We are here for argument on the pending motions, and there are a number of them. I did receive the letter from counsel for Business Insider, Mr. Keyko, with a proposed plan for proceeding today, which is fine with me, which is essentially, the movants or all the defendants.

The proposal is to start with Advance, I guess Mr. Schulz, to address the two motions you have pending, which are a motion with respect to public figure status of the plaintiff and a motion under Rule 12(c). I think it is fine to start with that. I will say I'd like you all to try not to repeat what is in the briefs. I have read all the briefs.

In particular, on one issue I will give you my initial inclination. On the limited-purpose public figure, I'm inclined to conclude that plaintiff is a limited-purpose public figure, although I do want to hear from Mr. Altman on that question. You don't need to spend a lot of time on that particular issue. But you can take it where you will.

MR. SCHULZ: Thank you, Judge. David Schulz on behalf of the Advance defendants. I will start very briefly with the motion to declare plaintiff in this case a limited-purpose public figure as a matter of law. As we spell out in our papers, this is a question of law for the Court. It is an issue that can be decided based on judicial admissions by the plaintiff contained in this complaint and on factual matters of which the Court can take judicial notice that relate not to the merits of newspaper articles and other things but the facts of various newspaper articles and other things which we have submitted with the Ackerley affidavit.

The standard under the First Amendment for finding limited-purpose public figure status is essentially whether or not they have thrust themselves into the public view to shape and influence an issue of public concern. That is the formulation in Contemporary Mission, a decision by this Court. It is an objective standard, what a reasonable person looking at the situation would conclude.

The Second Circuit has defined a more detailed, four-part test looking at whether someone has successfully invited public attention, voluntarily put themselves into a controversy, assumed some prominence in that controversy, and demonstrated that they have access to the media. As we show in our papers, all four of those standards are met.

THE COURT: The Second Circuit's formulation, unlike the Southern District, the Contemporary Mission case, actually uses the word "controversy," right?

MR. SCHULZ: Yes.

THE COURT: It seems to me part of the dispute is over that word. At least plaintiff seems to argue that the reason you haven't established public figure status is the controversy issue and that that is narrower than the issue of public concern formulation in that district court case. Do you want to address that?

MR. SCHULZ: Sure. As I understand it, plaintiff is making two arguments. One is that there is not a public controversy, which deals with our litigation, which is only of small interest to the community, and other is that it is a public controversy. Neither of those has any merits under the case law.

His own pleadings establish that there are a number of very, very public controversies that are of interest to a very broad audience. It includes, as he admits in his complaint, that he has appeared in a feature-length documentary over the controversy of the role of connoisseurship versus forensic art authentication, a term which the plaintiff claims credit for defining and being the leading figure in this public controversy. All of these are alleged in his complaint.

He also alleges that he has been the subject of a BBC commentary, he's been on CNN, he has been on other news outlets. He describes in his complaint numerous interviews he has had with the press, speaking with hundreds of people. He has been interviewed repeatedly by broadcasters. There is just no doubt here that he satisfies those standards.

We go through in our papers each of the four factors and cite to the record in our complaint. I won't do that now unless the Court has some specific questions.

I would also note that there is a separate issue here even if there was some question of whether he could satisfy the First Amendment standard, and we don't think there is. New York applies a broader standard, which essentially looks to whether plaintiff has taken affirmative steps to attract personal attention related to the subject matter of the story, which he clearly has. I think that is an even lower standard. Since New York law applies here, under either of those he should be declared a limited public figure.

I will rely on my papers unless the Court has questions.

THE COURT: That's fine.

MR. SCHULZ: I will move on to the merits of our motion for judgment on the pleadings. Briefly, by way of background, the Court will recall that Mr. Biro originally has claimed as false and defamatory some two dozen different parts in this article, including the article as a whole and the headline of the article. In the prior motion to dismiss the Court threw out most of those claims.

There are essentially four that remain at issue. One has to do with a description of Biro's work on paintings that were owned by Alex Matter. The complaint alleges that implies that Biro's work is not trustworthy. A second is a description of Mr. Biro by Elizabeth Lipsz and her lawyer, classic comment. The third is a description of a lawsuit between Mr. Biro and

Saul Hendler. The allegation is that he implies he knowingly sold fake art. Finally is the description of a provenance investment scheme. The complaint alleges Mr. Biro stood to profit from the sale of the work that he authenticated. Those are the four things that remain at issue.

Our motion for judgment on the pleadings demonstrates that there is really no proper basis at this point to proceed with these four main claims and the expensive and intrusive discovery that would be required, for two reasons, each of which is independently dispositive of the remaining claims.

The first is that the complaint fails to allege any facts that could plausibly support a finding of fault by the Advance defendants. If he is a public figure, that standard would be actual malice, knowledge that any of these four statements were false. Even if he is not, it would be gross irresponsibility and, as we say in our brief, albeit in a footnote, we don't think he would meet that standard, either.

The second ground is that there is no demonstrable reputational harm from these specific challenged statements in the context of this article where there are many, many statements which he has alleged to be defamatory, many statements on their face are defamatory that he didn't challenge as false. In that context, under both the incremental harm doctrine that is recognized by this Court and under the subsidiary meaning doctrine, which the Second Circuit has endorsed, those claims should be thrown out. I will deal with each of those separately.

I would note at the beginning that Mr. Biro has essentially nothing to say about the law or the facts with respect to the merits of our motion. In his opposition he spends most of his time throwing up a hodgepodge of procedural claims to urge the Court not to reach the merits. He throws up many procedural arguments, but none of them have any merit either as a matter of law, he gets the law wrong completely in many instances, and others are not factually well-founded. We can get through those fairly quickly.

His first argument is that it was improper for the Advance defendants to bring a Rule 12(c) motion having already made a motion to dismiss under Rule 12(b). That is clearly wrong as a matter of law. It's what the rules expressly contemplate and provide. It is what the courts, this Court and others, have unambiguously held as appropriate, and there is nothing unfair about it at all. The issues that are being raised on this motion were different and distinct from the prior motion, they haven't delayed the case, and there is no reason not to proceed as the rules authorize us to do.

His second argument is that somehow our motion is barred by law of the case because these issues must have been implicitly decided earlier. His basic theory is that because the Court said that these four statements were capable of a defamatory meaning and were not privileged, it had to have implicitly decided that he had alleged actual malice with sufficient particularity and that they were otherwise actionable. That's just not true;

law of the case actually doesn't even apply in this circumstance. It applies to phases of the case. If he had appealed something and the Second Circuit had ruled and it came back, then you would be barred under law of the case. What he is really arguing is some sort of discretionary authority of the Court not to go back and rethink things that had been decided. But these haven't even been decided, so there is no bar there to proceeding with this motion.

Finally, he argues that questions of fact should bar this motion because if you reject all those other arguments and you decide that we can entertain this motion, it has to be decided like a summary judgment motion, and the issue is are there questions of fact on the issues that we raise. Again he is wrong flatly as a matter of law.

As this Court held in the Effie Films case on a Rule 12(c) motion, the standard that applies is just like a Rule 12(b)(6) motion whether plaintiff has pleaded sufficient allegations to state a claim and move forward. So, all of his efforts to throw sand in the wheels here and to stop the motion from going forward are pointless, they are wrong as a matter of law, they are unsupported by fact.

I'll move on to the merits of our motion. We have two grounds. The first is essentially the false standard. I'll focus on actual malice because we believe that he is a public figure, that there is no serious doubt about that.

The pleading burden to overcome a motion to dismiss and to proceed in discovery of actual malice is the same as any other element of a claim. The Supreme Court has instructed in Iqbal and Twombly that a plaintiff, to survive this motion, is required to plead facts sufficient to render his alleged conclusions of wrongdoing here plausible on their face.

The plaintiff argues that that shouldn't apply to an actual malice finding, because under Rule 9(b) the things that require knowledge or persons's state of mind are subject to a different pleading standard. That argument was squarely rejected in Iqbal by the Supreme Court. It says the same standard applies to Rule 9(b) issues as to any other issue.

As we cite in our brief, every circuit court that has looked at this issue so far specifically in the actual malice context has agreed that Iqbal and Twombly would apply to actual malice. There is a Fifth Circuit case and a Fourth Circuit case that are in our papers and a number of district court opinions that are set forth in our papers as well

THE COURT: I think you can assume that we should assume that Iqbal and Twombly apply to allegations of actual malice assuming he is a public figure. The tough thing is applying Iqbal and Twombly. What does plausibility mean in particular situations? With respect particularly to allegations of someone's state of mind, how would you allege something that is sufficient to establish actual malice when that is a subjective state of mind sort of analysis?

MR. SCHULZ: What we believe the law requires is more than just to come in and say you got it wrong and therefore you must have known it was wrong, which is essentially what the plaintiff wants to do. He says, I have to get discovery about what you knew because it's subjective.

The Fifth and Fourth Circuits have said that's not right. You have to come forward with facts, not conclusions, that could infer knowledge of falsity or that can plausibly demonstrate knowledge of falsity if you get them right. There are a number of ways that you do that, none of which applies here.

If you could consistent with Rule 11 come in and say, look, this fact is false and you just made it up, that would create an inference. There are cases like that, the Mazarella case in the New York State courts where a reporter guessed at something. That allegation where you made it up or you had no basis for it would get you over the pleading burden.

You could allege that a statement was so inherently improbable that any journalist would have investigated it, that you must have had doubts about its truth, serious doubts about its truth, because it is inherently improbable. That can't be applied to any of these statements at issue.

You could make an allegation that this information was based on a source that you didn't know and therefore you had no basis to trust their veracity or their truthfulness, and that constitutes reckless disregard for the truth. Again, it doesn't exist here and couldn't be alleged here, because there are no unknown sources.

THE COURT: Are there allegations of that sort with respect to Ms. Franks?

MR. SCHULZ: There are allegations of bias with respect to Ms. Franks. But as to those, Judge, there is a number of things. First of all, Ms. Franks was not a source for any of the four statements that remain at issue, so it is an irrelevant issue about whether relying on her would have been actual malice or not. Number two, the statements that are alleged in the complaint that supposedly show her bias, that put us on notice of her bias, are all post-publication. They wouldn't support any inference that we should have known she was biased prepublication.

In reply, plaintiff has asserted that there are various prepublication facts that are not in his complaint that would demonstrate Ms. Franks' bias. But, again, that doesn't get him anywhere, because she is not the source for this. And even if she were, bias alone is not evidence of actual malice any more than someone denying a fact. If you write about someone and they deny the fact, the fact that they had a denial doesn't infer actual malice. You have to look at all the circumstances around it.

Here they don't make any of these sorts of allegations. They also don't make any factual allegation that David Grann had a motive. You might be able to infer actual malice in some cases if you could present facts to say there was a long history. In fact, the two cases that Mr. Altman cites are labor disputes where the court said there is enough pleading here to get over the Iqbal-Twombly standard, they involved employment disputes, and the court said the plaintiff has alleged a whole series of factual histories here from which one may infer a motive. Here there is a general allegation that Mr. Grann set out to harm him, but there are no facts. Mr. Grann didn't know Mr. Biro. There is nothing to suggest that that happened here.

The bottom line with respect to the standard is there are simply no factual allegations. There are only conclusory claims but nothing that, if proved, would plausibly establish that any of these four statements were published with knowledge of their falsity or serious doubts about the truth.

I could walk you through his pleading. He makes a number of arguments. His primary one is you failed to investigate, I have alleged that you failed to investigate, and that's enough. But it is not. In his own pleading he lays out all the facts that show the investigation. He says this went on for over a year. That's laid out in his complaint at paragraph 151. He says, you're known for fact checking. He doesn't allege anywhere that these facts weren't fact checked. He doesn't allege that he wasn't asked about each of these things.

The article on its face, which the Court can look at in assessing these claims, lays out all of the different times that Mr. Grann met with the plaintiff. He interviewed him on multiple occasions. The last quarter of the article is Mr. Grann point by point presenting to Mr. Biro things he has learned from looking at court files and talking to people and getting Mr. Biro's response.

So, on the face of the article and on the pleadings in the complaint about the time and care that went into this, there are no facts that could plausibly support a claim that he failed to investigate. There is nothing to suggest he didn't go to any source, that he avoided certain people, that he didn't look at relevant evidence, any of the sorts of things that might get him over his pleading hurdle.

THE COURT: I have one particular legal question that I want to ask before I forget, which is the subjective nature of the actual malice standard. I always recall the standard as knowledge of falsity or reckless disregard with regard to its truth or falsity. But the way you characterize it as knowing falsehood or subjective awareness of probable falsity, are those the same? Did Gertz change the standard to subjective awareness of probable falsity?

MR. SCHULZ: I think the subjective awareness of probable falsity is consistent with St. Amant and some of the other Supreme Court cases that try to explain the actual malice standard laid out in our brief. Just as "actual malice" was kind of a misnomer because it is not really malice, it is talking about knowledge of falsity, "disregard of the truth" is an imprecise term. Negligent disregard of the truth is not the same as negligence or gross negligence. It is still a subjective look at what you knew.

What the court says, I believe it is in St. Amant and some of other early libel cases, what they meant was either you knew it was false or you had serious doubts and you went ahead and published it anyway. But it remains always a subjective standard looking at your awareness of truth and falsity, not did you do the sorts of things that a normal reporter would have done and were you reckless not to do certain things. It goes to did you publish it with a knot in your stomach thinking it is probably not true but you went ahead anyway. That's the sort of approach that is required.

THE COURT: If he could prove actual malice for statements as to not these four that remain in the case but to the others, is it your position that that would be irrelevant, that what is relevant is actual malice as to these four?

MR. SCHULZ: Yes. The law is quite clear that he has a burden to establish actual malice with respect to each of the statements that are at issue. It is not that we knew something was false and therefore something that we didn't know it was false damaged him. That wouldn't get him there. It has to be tied to the claim.

Other than what we have talked about, the failure to investigate, which is contradicted by his own pleading and is not supported by any facts, the use of unnamed and bias sources, which also is irrelevant to the four claims, the other points that he argues are really specious. He suggests a failure to retract can imply actual malice, but that is post-public conduct, irrelevant to what was known at the time.

Then he has an absolutely scurrilous, inappropriate, and offensive allegation that you can infer actual malice because Mr. Grann was once sued for libel and it survived a motion to dismiss. I believe that that statement doesn't say anything about Mr. Grann and whether he published anything false. It doesn't say anything about whether Mr. Grann knew what he was publishing was false. All it says is that the story as written could reasonably have been read in a libelous way and was sent back for trial.

The Second Circuit and this Court have been quite clear that it is improper for a lawyer to put that type of allegation in a complaint. It should have been removed after the first complaint, when we objected to it. It has persisted through four complaints, and it is inappropriate conduct. In any event, it is not evidence of actual malice.

There is nothing in the complaint from which you could possibly infer actual malice with respect to these claims. For that reason alone, these few remaining claims should be thrown out.

I'll turn now, unless the Court has some other questions on actual malice, to the incremental harm argument and subsidiary meaning. The gist of this is to say look, if you look at what the complaint alleges about what's left in here, there are four statements, but it essentially alleges that there were three types of reputational harm to Mr. Biro:

One, that his work is unreliable;

Two, that he engaged in fraudulent business practices. That really relates to two of these. The con man I think is really the same connotation, that he engages in fraud or fraudulently business practices;

Three, that he intended to profit from his authentication.

THE COURT: On the incremental harm and subsidiary meaning points, I think I address those in a footnote in my original opinion. Does that take you out of the propriety of the 12(c) motion because that aspect of it has been addressed?

MR. SCHULZ: No, because that aspect wasn't addressed in the context of what's not actionable. We have 24 statements there. To try to argue something was incremental to everything else doesn't make sense.

THE COURT: Because you didn't know how it was going to come out.

MR. SCHULZ: Right. Now, we know that the bulk of this information in here, which Mr. Biro finds so highly defamatory to him, is not actionable. He cannot sue on most of these statements. So these three remaining reputational harms that he is asserting flowing from these minor facts -- that he is unreliable, that he engages in fraud, and that he profits from -- are not different in kind or degree from what the Court has said he can't recover for.

The unchallenged statements, as the Court said in its earlier order, convey an implication that Biro is a fraud, include allegations of forgery that are among the most damning statements in the article and raise questions about the reliability of his work. Those are the unchallenged statements.

Among the claims that he challenged and the Court said he cannot pursue, because he has no actionable claim, are alleged implications that he knowingly sold fake art, that he committed a fraud, that he is a liar, that he is a thief, that he is a fraud, among others. All of those are nonactionable. Those clearly are damaging to his reputation.

What's left is essentially trivial complaints that did not deserve further judicial intervention. That is the standard under the incremental harm doctrine, that the court looks under the incremental harm doctrine to the harm that might have flowed from the things that arguably are actionable because there is a claim that they were false and he survived a motion to dismiss on the defamatory meaning and privilege.

Compare the harm that could have been caused from that to the harm from all the things that are not actionable. As Judge Preska said in the Jewell case, it's a burden for the Court to take on and to get rid of things where they are really trivial given the broader thrust of the article. We would submit that that is the case here.

We believe the subsidiary meaning doctrine also is an independent ground for throwing it out if you find him to be a public figure. It is really a variation on the actual malice standard. The subsidiary meaning doctrine considers that same issue about are these really more defamatory but through the lens of actual malice.

If he has no claim for all these other things, the question is could you find as a matter of law that he can proceed with a claim, for example, that we got something wrong on the Hendler case about whether he switched art or not when there are these other statements out there as to which there was no actionable malice relating to those other lawsuits.

THE COURT: What is the theory of the subsidiary meaning doctrine? Is it that the allegedly actionable statement can be inferred anyway from the nonactionable statements?

MR. SCHULZ: It's that the alleged wrongdoing, the alleged fault with at least four statements, the defamatory meaning that they convey is subsidiary to meanings as to which there is no actual malice. In other words, they can't allege there was actual malice with respect to the implication that his work is untrustworthy, because there are many, many things in there which the Court has said are not actionable.

That was a knowingly falsehood. He can't proceed with the claim that Ms. Lipsz called him a con man when the Court has said there is no actual malice, there is no actionable claim with respect to all these other things where he is called a liar, he has engaged in fraudulent business practices. Those are subsidiary.

Again, the basic notion is in light of the thrust of the article, to proceed into all of this complicated discovery on issues that really could not have had any significant impact on his reputation is not a good use of judicial resources, because he hasn't really any basis to claim significant harm. Each of those independently are grounds for dismissal at this time.

As we say in our papers, we believe it should be dismissal with prejudice, certainly under the incremental harm doctrine. If the Court agrees with us on incremental harm and subsidiary meaning, you can't plead around that. With respect to actual malice, we would submit based on the judicial admissions and the facts presented in the article about the care that was taken here, there is no reason to allow leave to replead, particularly when we are on our fourth complaint already.

THE COURT: Thank you.

Mr. Altman, did you want to respond?

MR. ALTMAN: The purpose of the public figure doctrine is that the First Amendment is implicated most significantly.

MR. SCHULZ: I'm sorry to interrupt. Could you use the microphone? It is hard to hear you when you are speaking that way.

MR. ALTMAN: I'm sorry. Let me pull the microphone in. Can you hear me now?

MR. SCHULZ: Yes. Thank you.

MR. ALTMAN: The public figure doctrine is based on the idea that the First Amendment is most strongly implicated when there is a public controversy, and the public controversy is something which, as the Lehrman case says, is any topic upon which sizable segments of society have different strongly held views.

What's the controversy in this case? Is the controversy whether you can authenticate art by looking for fingerprints or is the controversy whether Mr. Biro made a mistake or whether Mr. Biro committed fraud? There is no controversy here about art authentication or about the entire subject. What we have is some very nice, fascinating, and newsworthy stories.

THE COURT: Isn't it essentially the issue of art authentication?

MR. ALTMAN: No.

THE COURT: The opening of that documentary, "Who the blank is Jackson Pollock," the quotation, this is in defendant Advance's reply believe, says is this a genuine, honest-to-God no-doubt-about-it American masterpiece, possibly worth as much as $50 million. Maybe. That whole film is about art authentication and the sort of new, cutting-edge forensic technique versus the old guard, who said you can't do art authentication without understanding the art as art.

MR. ALTMAN: But the story, if you look at it as a simple news story, is basically about a foul-mouthed female truck driver who bought a painting for $5 at a thrift store and maybe it's worth millions of dollars. That's what the story is. The fact that you had Thomas Hoving sniffing at the whole idea doesn't make it a public controversy. You're not going to find sizable segments of society who take an issue here.

The First Amendment is not implicated unless it has some political connotation or some commentary into which someone has thrust himself. Mr. Gertz, for example.

THE COURT: It could be an issue of public concern. I don't think it has to involve something that hundreds of millions of people are interested in.

MR. ALTMAN: Indeed. Now, Mr. Gertz was a well-known Chicago lawyer. He was representing the family of a boy who a policeman had killed and who had been indicted for this. He was well known in the community. He spoke publicly. He was interviewed. He was not a public figure.

Mrs. Firestone was a rich woman who was getting divorced in Palm Beach, and it was an ugly divorce, so everybody knew about Mrs. Firestone. She wasn't a public figure. It was a news story, yes, and it was an interesting news story, and everybody wanted to write about it, but she was not a public figure.

Mr. Hutchinson was accused by Senator Proxmire of fleecing the government. He had a contract. He was not a public figure.

What we don't have here is some controversy about which people can legitimately argue, and we don't have a controversy into which Mr. Biro thrust himself. Mr. Biro was working on behalf of his clients. Mr. Biro was not pontificating about anything other than the work he did for Teri Horton, the work he did on the Matter paintings, and so forth.

THE COURT: Is it your point that art forensics or forensics as applied to art is not a controversial field?

MR. ALTMAN: I don't know. Do we have somebody on the other side who says it's not? Is it a subject of public controversy? I don't think it is. We are talking now about Mr. Biro. Mr. Biro here is the issue, not art authentication in general.

The other day I'm watching television and they are talking about, on a news program, The Associated Press subpoenas, the story that just broke, certainly a subject of public controversy. Suddenly, I see Mr. Schulz being interviewed about his views about this. He's representing The Associated Press. Does this make Mr. Schulz a public figure? Certainly not. He's a lawyer representing his client. I'm here representing Mr. Biro and this case has been publicized. That doesn't make me a public figure either.

What you have here is not Mr. Biro thrusting himself into a matter of public debate. What you have is Mr. Biro defending the interests of clients that he has worked for.

THE COURT: What if there was a documentary about the AP thing and Mr. Schulz, not representing a client, was in the documentary and spoke about what happened with the justice department issuing those subpoenas -- I don't even know the facts, but whatever happened -- and talked about how bad it was. Wouldn't that make him a limited-purpose public figure on the issue?

MR. ALTMAN: Is he representing the AP or isn't he?

THE COURT: I was saying if he wasn't.

MR. ALTMAN: If he wasn't, then I would say that could very well make him a public figure. I'm not standing up here exercising my First Amendment rights to comment on a matter. I'm here representing a client, just as Mr. Schulz is. I think that is a significant difference. This is why Mr. Gertz, for example, was not a public figure.

THE COURT: You're focusing on this controversy requirement. I know the Second Circuit formulation does use the word "controversy." I actually think Judge Sack in his treatise suggests that Gertz might be read as not requiring an actual controversy about which sizable groups of the populace disagree.

MR. ALTMAN: I happened to read Gertz yesterday, and that is not my recollection of what it says.

THE COURT: You think it requires a public controversy?

MR. ALTMAN: Yes. And it just wasn't present. He was simply being attacked by the person he sued. He was being attacked and called a Communist simply because he was representing his family. Even though, obviously, that's a public controversy, still, Mr. Gertz was not a public figure.

It's a distinction between being newsworthy and being controversial. Yes, I can agree that it is newsworthy when maybe there is a new Leonardo and maybe there is a new Jackson Pollock. Yes, that is newsworthy. But that isn't the same thing as what we have here.

Again, what are the First Amendment implications that are brought in when you want to talk about someone who is an art authenticator. Does that give you a license to say that he is a crook? Does that give you a license to drag up a bankruptcy from 25 or 30 years ago and to interview people who sued him 20 years ago?

THE COURT: All it does is change the standard to the actual malice standard. No one is saying it gives a license to do anything. It just changes the standard. And everything in the case needs to be looked through a new lens if he is a public figure, right?

MR. ALTMAN: We have no less than 48 articles and matters attached to the defendants' papers to try to prove that he is a public figure. Only four of them even peripherally suggest that he is because they attack him directly. Most interesting is I think an article in the New York Post which says that maybe he is a fraud. That's the extent of it. Everything else is either a news story or Mr. Biro's website.

THE COURT: These articles, the four articles you're talking about, are pre publication of the article?

MR. ALTMAN: Yes. I think we can agree that we must leave out everything which was a result of either the article in The New Yorker or this lawsuit as irrelevant to the public figure analysis.

THE COURT: If you want, unless there is anything else you want to say about the public figure thing beyond what is in your brief, you can turn to the 12(c) motion.

MR. ALTMAN: Let me make one observation, because Mr. Schulz pointed it out.

THE COURT: Sure.

MR. ALTMAN: Saying that the New York State law standard for public figure analysis is somehow more liberal. It is actually not. It's the same. It's the same. And it's been stated to be the same in a very involved New York State supreme court case.

THE COURT: Do you have that cite?

MR. ALTMAN: Yes, I do. It's a supreme court case in Monroe County. The citation I have is 174 Misc.2d 763, 663 N.Y.Supp.2d 738. Even though it is only a supreme court case, it is very lengthy and it is quite a treatise on the whole subject.

THE COURT: You said 174 Misc.2d?

MR. ALTMAN: Misc.2d. Also, your Honor, I should say it was affirmed by the Fourth Department, 254 A.D.2d 790.

The New York law of public figure classification uses a similar approach, that is, to the federal standard, although it is not articulated in terms of separate elements. It goes on. I would point that out so your Honor can take a look at that case. The New York State standard is really no different. It doesn't provide greater protection than the federal standard.

Now with respect to the 12(c) motion, yes?

THE COURT: Yes.

MR. ALTMAN: It is law of the case that we have stated eight claims upon which relief can be granted. Law of the case is not res judicata. I have no problem admitting that. Nonetheless, we have stated it. Therefore, that means with respect to each of those that a reasonable jury could find, based on each of those statements, that Mr. Biro has been defamed.

Now, do I have to prove malice? If you say he is a public figure, then yes, I do. If you say he is not a public figure, then no, I don't. But what I have said by upholding these claims is that I have stated a defamation claim. Were it not for the malice standard, a complaint in this case could simply be me holding up this article and saying this is defamatory, your Honor, and everything in it is false and I should be able to go forward. Malice complicates it, but it doesn't defeat it.

THE COURT: My understanding of Rule 12(h) is that a 12(c) motion, and Wright and Miller I think suggest this, a 12(c) motion can be made following a 12(b)(6) motion if it is making different arguments, and the Twombly-Iqbal argument about actual malice is an argument that was not made on the 12(b)(6).

MR. ALTMAN: No, I don't agree. The rule is stated by exception. What it says is that you can make a 12(b)(6) motion after filing your answer. It says you don't forfeit the right to make a 12(b)(6) motion if you wait until after the answer is filed.

The handful of cases in which somebody moved twice were cases where the complaint was changed. When you upheld, when you granted the plaintiff leave to replead, your Honor, you said you may not change the claims against The New Yorker, and I didn't. So, we have not another motion against the amended complaint, we have another motion against the same complaint.

To uphold any of these claims, you have said, in effect, they are legally sufficient, period, end of story. To come in now and argue malice when he certainly could have done it on the first motion, like all the other defendants did, seems to me he's forfeited that argument.

THE COURT: I'll figure out the procedural issue. I think I have a fair amount of discretion on that point. What I really want you to focus on is, assuming I get to this, what are the allegations that are sufficiently plausible, assuming Iqbal and Twombly? Or Twiqbal, as they call it.

Assuming that they apply to allegations, including the necessary allegations of actual malice in a defamation case, and assuming that he is a limited-purpose public figure, what are the allegations that are sufficient in your view for these four claims?

I don't know that you have to read them, but if you could describe what you say in the complaint that is enough to establish plausibility as to those allegations, bearing in mind that it's essentially you have to show a plausible merit of a subjective fact, that is, the fact that Mr. Grann and/or The New Yorker knew these statements, these last four set of statements, that they were false or had essentially subjective awareness as to a high probability of their falsity.

MR. ALTMAN: You're interviewing people who were involved in litigation against Mr. Biro. You're not merely quoting public documents which reflect those claims, you're going beyond those public documents. That's why you said that whether section 74 applied was an open question.

If I talked to anybody who was an adversary of anybody in a court proceeding, what are they going to say? If they won, they would say he was a crook. And if they lost, they would say he got off, he shouldn't have.

THE COURT: By the fact it was someone who litigated against --

MR. ALTMAN: Someone who has an animus against. You're going to a source and you're quoting someone who obviously has something against Mr. Biro.

THE COURT: OK.

MR. ALTMAN: Furthermore, none of these allegations, these defamatory allegations, arise out of the public controversy even if he is a public figure. I think you have to really look at these allegations outside the context of the art authentication.

You talked to Theresa Franks, who has been at this point thoroughly discredited. You talked to Mr. Wertheim, this fingerprint expert, who my investigations have shown, and this might be basis for a motion to replead as much as the defendants might not like it, Mr. Wertheim's integrity has been called into question. You raised things which have nothing to do with the public controversy.

Most important on the issue of malice, the cases where somebody gets dismissed for failure to allege malice, they don't involve media defendants at the pleading stage. We are at the pleading stage. I have to say it again. This case is two years old. I haven't had one shred of discovery. I don't know anything about how this article came to be written.

What can I say consonant with my obligations under Rule 11 that isn't tantamount to making something up as to what Mr. Grann had in his head and what Mr. Remnick said to Mr. Grann when he asked him to authenticate whatever he was saying? Did you talk to this person and that person. How am I supposed to know that? How can I in good faith say anything about that? If you want to talk about the standard on a summary judgment motion, fine, but that's not where we are.

Now, the handful of cases where people have been dismissed, libel plaintiffs have been dismissed on the pleadings, the district court cases, they knew each other or they had some connection to each other or some prior relation or business, something. Maybe that's plausible. Maybe you should have the burden in that case of knowing something about what this person said about you. But The New Yorker's argument here is tantamount to saying that a public figure who sues a media defendant has no idea. He can never have a claim. He can never have a claim. That's not the law.

There's more. There is more that I have dug into. There are questions that Mr. Grann asked of Mr. Biro when he interviewed him which I was hesitant to put into the complaint, frankly, because I think they are very damaging. But I didn't put them in. I'll put them in a motion to replead if you think I haven't sufficiently pleaded malice at this point. I think at this point there is enough here to raise some colorable questions, plausible questions, whatever the standard is under Iqbal and Twombly.

Again, their argument is essentially that Twombly and Iqbal overruled Rule 9(c) which says malice can be pleaded generally. Again, how am I supposed to know what's in the mind of a defendant if I have to plead it other than generally? That's the basis. That's the point of that rule. In a case where I'm a total stranger to how this article came to be published, where I know nothing about it, I don't think that I can be held to make -- I can't make up facts. I do have Rule 11.

It is either sufficiently pleaded or I should be allowed to do it again and put in everything at this point. We have done some investigations in the past year, and I have some further evidence which I would put in if it comes to that.

The incremental harm doctrine. The Ninth Circuit judge who said the doctrine was stillborn --

THE COURT: Judge Kozinski.

MR. ALTMAN: Yes.

THE COURT: In a dissent.

MR. ALTMAN: In a dissent. What you are saying is the incremental harm doctrine is saying that what is actionable adds nothing to the harm caused by what is not actionable. I don't think you can say that as a matter of law.

You have already held that these four statements potentially can go to the jury. It means I can get discovery. And if I have to prove malice, fine, if I don't have to prove malice, fine, but either way potentially I get to go to the jury. It's the jury who determines what the harm is by a defamatory statement. I don't think that you can say or any judge can say as a matter of law these are too trivial to bother with.

THE COURT: I think normally that's right, that incremental harm would normally be hard to get at on a motion on the pleadings. The question is in a case like this, where there was a long article and there were 20 passages that I have determined are not actionable and where defendants do a pretty good job of pointing out that they are really of a piece in terms of the reputational harm that you could infer, that a jury could infer, and there are four left, and the four sort of don't really add anything to the 20 -- in other words, in a case where it is two, one is in and one is out, it is sort of different, but in a case where they are kind of part of the same fabric and there are 20 versus 4 and you look at the nature of them, they are connected, it's a little trickier, don't you think?

MR. ALTMAN: No, frankly, I don't think it is tricky. I think that Judge Scalia had it right when he was on the D.C. Circuit, though I'm not usually fond of quoting him in favor of my positions. Nonetheless, I think he is correct where he talked about Benedict Arnold being a traitor but not a shoplifter.

THE COURT: That goes to my point. It's a different type of allegation.

MR. ALTMAN: It's a different type of allegation, yes. Essentially, to adopt Mr. Schulz's argument about the incremental harm doctrine would be to say notwithstanding that I have upheld the facial validity of these four statements or I should say the potentially defamatory nature of these four statements, you can't win anyway, so I'm dismissing them, well, what's the point? Either they are defamatory, which means the plaintiff gets to go forward and prove his case, or they are not defamatory, in which case the plaintiff doesn't.

That it is surrounded by this halo, miasma is really what I meant to say, of vicious, ugly, threatening, damaging statements which, respectfully, I don't agree are not defamatory. But that is a subject for another day.

THE COURT: And probably another court.

MR. ALTMAN: Probably another court, yes. I mentioned this in a lengthy footnote in my opposition papers. I really do think, your Honor, I don't mind saying it, since I'm seeing you, that there are so many general denials in the complaint of veracity of statements, I think it is a very strong imposition on a plaintiff to say each and every statement is false and defamatory in this respect and that respect. Again, that is a subject for another day.

I just don't think that you have the basis to conclude solely on papers, solely on pleadings here, that I can't prove to the satisfaction of a jury that these four statements are not damaging and that I'm not entitled to compensation and to a judicial determination of falsity at the end of the day. I don't think you can say that now. It just doesn't seem consistent with the way the federal rules are supposed to operate.

And it is not consistent with the idea that it's not for the Court to determine the damage here. It's for the Court to determine the threshold issue, that these things are susceptible of a defamatory connotation, which you have already said they are, and everything else a question of fact. Or, at the end of discovery, the subject of a no-doubt massive motion for summary judgment.

THE COURT: I understand. Anything else on the point? I want to give Mr. Schulz, if he'd like, a chance to reply briefly and then turn to Business Insider.

MR. ALTMAN: No, your Honor, that's it.

THE COURT: Thank you, Mr. Altman.

Did you want to reply to anything briefly?

MR. SCHULZ: Very briefly, Judge. Two points that came up by Mr. Altman.

First on the public figure thing, very briefly, I think there were a lot of confused references to cases. As I understood the first argument that was being made, it is that there is no controversy here because the issue of art authentication is trivial. That's not really the standard. It's a question of whether it's an issue of public concern.

We cite cases in our brief, for example, the Hendler case, where the controversy at issue was over the resurrection of Vanity Fair magazine, whether that was a good idea or bad idea. Park West Galleries cited in our brief, a District of Michigan case, the specific controversy that drives public figure status was whether certain Dali paintings were authentic. That seems to be directly on point. It's not an issue that it has to be some big political debate. I has to be a public controversy. That's number one.

Then Mr. Altman cited the Gertz case, the Firestone case, the Hutchinson case, and said none of these people were found to be public figures even though they were involved in controversies. It wasn't the issue of the controversy. They weren't public figures because they hadn't voluntary stepped into the controversy and put themselves out there.

None of them were leading characters in a publicly distributed documentary by the producers of 60 Minutes. None of them appeared on CNN, on BBC, on National Geographic, appeared at conferences advocating for a specific role. None of them had websites saying what I do is right is what everyone else does is wrong.

This is public advocacy. He has voluntarily stepped into a series controversies about specific pieces of art each of which are controversial positions in and of themselves. And in the overarching controversy of whether Mr. Biro's claimed scientific approach has any merit, that in and of itself is an overarching controversy which is the subject of the article. So I think there is just no dispute that there is a public figure status here.

With respect to the New York standard, the standard that I cited is one that is articulated by the New York Court of Appeals in the James v. Gannett case in 1976 cited in our brief and in the Malt case in 1981 cited in our brief. We will rest on those.

On the issue of actual malice, Mr. Altman seems to argue that because we interviewed people who he alleges had animosity to his client, that is enough to suggest we must have known that they were lying and therefore, by repeating their lies, we engaged in actual malice. That just can't be right. First of all, that whole line of argument is inconsistent with his notion that we failed to investigate. We talked to a lot of people about a lot of things, and I think you can set that aside.

Even turning to this notion of interviewing people with malice, if that theory were right, you could never publish this type of article without ending up in litigation over who is right and who is wrong. This is not an article where Mr. Grann took sides. He interviewed people who said some pretty nasty things about Mr. Biro. He also interviewed Mr. Biro, and with respect to every single allegation he put out Biro's side.

There is nothing that can be inferred from the article itself that he knew these people were lying or that he knew that Biro was lying, and he doesn't take sides. So I don't think that analysis particularly holds up or is relevant to the question of actual malice in this context where the question is knowledge of falsity.

Mr. Altman also said that this Iqbal and Twombly standard hasn't been applied in a media case. That is not true. We cite the Pitman case in our brief and In re Hauptman in the Washington Post. Those are cases where you had media defendants.

Turning to this question of how can I know what is in their head, the sort of plea that this can't be right, I guess the answer I would propose is that's what the Supreme Court has said.

There are two things going on here. The Supreme Court has said that the First Amendment protects certain false speech. You don't have a claim just because something was false if it involves a public controversy and you're a public figure. Part of your burden is to show that the speaker knew it was false.

The Supreme Court has also said in those contexts you have to have some facts that would give rise to a reasonable inference that they knew it or you don't get to go into court. You we are not going to go into this massive discovery and the expense and the burden of litigating things if you don't have some evidence of knowledge of falsity.

I submit that it is hard to conceive of a case more clear where there is nothing at all either in the pleading or from the face of the article from which you could infer that Mr. Grann had one iota of belief that anything he put forth was false. To the contrary, he took extraordinary pains to be sure that everything that was in his article was accurate. He vetted it with the plaintiff. He presented it. He laid out all the sides.

This is precisely the sort of case where the pleading standard is meant to say we are just not going to take the time of the court and the expense and the burden on the parties of going down the road in pursuing these allegations.

Finally, on the incremental harm, I think we have explored that already. The one point I would make, it is quite clear that it can be decided on a motion to dismiss. The Jewell case was exactly in that context, Judge Preska's decision. We think that it is appropriate to decide it at this time on the record.

THE COURT: Thank you.

MR. ALTMAN: Your Honor, can I have 30 seconds?

THE COURT: Sure.

MR. ALTMAN: Two things. First of all, the Park West case about there is a controversy over the authenticity of Dali prints, Park West was held to be not public figure in that case. The reason they were held not to be a public figure was that they didn't have media access. Does Mr. Biro have media access to refute what's in this article? Should he be held to have lost something or waived something because instead of speaking out for a year he decided to file a lawsuit? That's a big issue here.

Media access. The idea of public figure is that a public figure has that media access to refute allegations and charges made against him. I didn't happen here. So I think that is a factor.

THE COURT: Thank you. Let's turn to Business Insider's motion, Mr. Keyko. I know there is a lot to get through. Realize that I have read your brief, so no need to repeat.

MR. KEYKO: I understand. I will be brief. In part, I'm helped by the fact that the allegations against the Business Insider are extremely brief. Indeed, there are only eight paragraphs in the entire complaint that mention Business Insider.

As your Honor knows, Business Insider moved to dismiss on two grounds: One, that actual malice was not sufficiently pled; secondly, that it's one statement that is alleged to have been defamatory, it is a statement of opinion, and the basis for that opinion was explicitly set forth in that one sentence.

If I can briefly review the eight paragraphs. The first paragraph is simply the statement about where Business Insider is incorporated and headquartered and is pretty much irrelevant.

The other paragraphs set forth what the alleged defamatory statement is. It is one sentence. "But soon after New Yorker reporter David Grann wrote a profile of Biro revealing him as a forger and long-time fraud who created phony fingerprints on paintings to market them as genuine." The next paragraph states that that is the defamatory statement.

The plaintiff has alleged that he asked or demanded a retraction, that in fact that statement was removed from the article. In fact, the references to Mr. Biro were removed from the article.

He then states, and I quote, "Defendant Business Insider acted with actual malice in that it knew or should have known that the statement of fact was false and they published it notwithstanding that knowledge." That is the only statement about actual malice in the complaint.

In the briefs, however, argument was made that there are two other things that the Court should look to that could plausibly create an inference that Business Insider acted with malice. Those two facts are, first, that Business Insider article was published a few days after the complaint against The New Yorker defendants was filed, and that on the same day the article that is alleged to have been defamatory was published, Business Insider also published an article that briefly describes that lawsuit, so Business Insider was aware of the lawsuit.

Biro effectively concedes in his brief that he has not made anything other than a bare-bones allegation of actual malice. He states on page 5, "Mr. Biro's inability to set forth specific facts to demonstrate malice in his claim is no bar to his proceeding to discovery to establish them." I'm not going to repeat anything about that. It has been very ably argued by Mr. Schulz. That's not the law.

Instead, I'll go through very briefly and talk about the allegations in the complaint and in the brief and do those create a plausible inference of actual malice. First is the retraction. Actually, the retraction negatives any possible motive which, as Mr. Schulz just discussed, could possibly plausibly give rise to an inference.

The second thing is the allegation that, well, the Business Insider was obviously aware of this complaint. The issue there, though, is we obviously were aware of the complaint. But who is the complaint against? It's against The New Yorker. I quote, "Defendants Advance and The New Yorker magazine have a reputation for being assiduous and thorough fact checkers." That is actually from the complaint.

There is actually a case that we discussed, and I won't repeat our discussion of that, Mason v. The New Yorker magazine. It is a 1992 Ninth Circuit decision. In that case there were almost identical facts against a book publisher where the book publisher relied on a New Yorker story.

There had been the allegation that the publisher was fully aware of the fact that the subject of the alleged defamation had gone to The New Yorker and told them these statements are false; nonetheless the court said, given The New Yorker's fact checking, the publisher could still rely upon The New Yorker in publishing its story.

Here there is, of course, an additional basis for that. One has only to read the complaint to see, as this Court has pointed out numerous times in its August decision, that the underlying allegations about false fingerprints, fraud, and so forth, were not challenged.

Those are obviously the conclusions drawn by Business Insider. Had Business Insider read and studied the complaint, it could still have reached the same conclusions that it did. The fact that the lawsuit had been filed in fact effectively confirmed the conclusions it reached.

I would cite your Honor to three, and I'll read them if I may, very short sentences from your opinion. At page 46 you wrote, "Even presuming Biro's allegations as true, the language in the passage at issue does not reasonably give rise to an inference that plaintiff's reputation was unwarranted or that he was a fraud. Again, a reader may ultimately draw that conclusion from the article, but such conclusion would be largely based upon portions of the article that Biro does not challenge," again showing that despite the lawsuit, Business Insider was completely reasonable in relying on the article still, and that could not give rise to an inference of malice.

The Court then also states on page 60, "There is little question that a reader may walk away from the article with a negative impression of Biro, but that impression would be largely a result of statements of fact that Biro does not allege to be false."

Finally, on page 57, "To the extent that the narrative contains any implication that Biro did in fact engage in misconduct, the implication arises from portions that Biro does not challenge." The fact of the lawsuit and the complaint actually support the conclusions set forth in the article, not negatively, and certainly therefore does not give any rise to any implication of malice.

Now I'd like to very briefly turn to the opinion issue. The Court noted in its opinion of August 9th that a statement of opinion that is not purportedly based on undisclosed facts is not actionable. Here we have to look at what does this one sentence say.

The one sentence doesn't say The New Yorker concluded that or The New Yorker stated that. It draws a conclusion from these unchallenged facts, that is, that those facts reveal that there was a fraud. That is a statement of opinion, and the very basis of that opinion is set forth in that actual statement. Therefore, that is not actionable.

The only other thing that is mentioned by Mr. Biro in his answering brief is, well, look at the title of the article. The title of the article is not alleged to be defamatory in the complaint. Nonetheless, if you also look at the title, the title does no more than explain or repeat in essence what the actual quote is.

In the Second Circuit's opinion in the Karedes v. Ackerley Group opinion, it is stated that if the title is no more than a fair index of what is set forth in the article and the substance of what is alleged to be defamatory in the article is not defamatory, then the title itself is not actionable. I respectfully submit that that would be the case here.

Unless your Honor as any questions, I'm finished. Thank you.

THE COURT: Thank you.

Mr. Altman, would you like to respond?

MR. ALTMAN: I don't need to repeat anything that I have previously said about malice and the necessity of pleading those. There are a couple of things, though, that I would like to point out.

The headline here in this posting was "9 of the Biggest Art Forgeries of All Time." If Biro is named in there, I think it is not an opinion to say that Mr. Biro is one of the nine biggest art forgers of all time. That is not hyperbole, that's a factual assertion.

The quote is "New Yorker reporter David Grann wrote a profile of Biro revealing him as a forger and long-term fraud," long-term fraud, "who created phony fingerprints on paintings to market them as genuine." The New Yorker article didn't even say that. The New Yorker article quoted people who said that, but the article itself didn't say that. So we have Business Insider calling Mr. Biro a forger and long-term fraud. I think that's rather defamatory.

THE COURT: Your view is that looking at the New Yorker article itself, that is the implication that readers draw. Isn't that the basis of your defamation claim against Advance?

MR. ALTMAN: Yes.

THE COURT: So Business Insider is making the implication in writing that you say readers make anyway.

MR. ALTMAN: They are making it explicit, that is correct.

THE COURT: Right.

MR. ALTMAN: First of all, I think we can agree perhaps, because Mr. Keyko didn't go into it, but the notion of republication of someone who republishes a libel is being potentially liable as the original source. We have here the cases that I cite in the brief, Foster v. Turner Broadcasting case and the Cianci case, which also, by the way, holds that a headline can be defamatory.

This is not an opinion. This is certainly not an opinion to state this. If it's merely repetition of what The New Yorker said, it's no less actionable than it is against The New Yorker.

Furthermore, it is denied. The claim that Mr. Biro is a forger is denied. Paragraph 245 of the complaint: "Plaintiff is not a forger nor a fraud, whether long or short term, and he has never created phony fingerprints on paintings for any purpose whatsoever." I think that is pretty explicit.

I think that we have stated a claim here against Business Insider, and I think their motion should be denied.

THE COURT: Thank you. Mr. Feige.

MR. FEIGE: David Feige. I have the luxury of being very brief. We are not dealing here with a 16000-word pierce in an estimable publication, but rather eight sentences on a website. Even better than the that, your Honor, we have, unlike the other defendants, a threshold question which is dispositive here, and that is very simple.

The plaintiff's entire case is time-barred as to us. One barely needs a law degree or even a calculator to do this, just a calendar. On July 5th New Yorker published its piece. On July 7th Gawker published its eight-sentence piece triggering a one-year statute of limitations. I don't believe any of these four facts, by the way, is contested.

December 5, 2011, well after the expiration, was the first time that we were brought into the case. We had no notice before that, and frankly nothing changed except the plaintiff's litigation strategy. Quite simply, as to my client, his claims are time-barred.

Mr. Altman does suggest that the statute should be tolled because of because of a republication doctrine. What he does in that is he argues that comments by readers should trigger republication or suggest republication. That is entirely eviscerating the statute of limitations. That is not the law, and I suggest that is not what the Court should do here.

By the way, Judge, we agree on the seminal case in this matter, which is the New York State Court of Appeals case, Firth. What is lovely about Firth is at its core it makes clear that "in order not to retrigger the statute of limitations, a publisher would then be forced to either avoid posting on a website or use a separate site for each new piece of information." That is precisely what that case sought to avoid and it is precisely what Mr. Altman seeks to do here. I suggest the Court should not allow such a thing.

I note one other thing because it is not in the briefs. In footnote number 2 in Mr. Altman's reply, he does an interesting thing, which is he does indicate that he has no intention of suing my client because of any of these comments. Frankly, we would enjoy immunity under the Communications Decency Act.

But my point about that is if the whole structure is to avoid liability for comments, we would we then, by accepting comments, be subject to suit essentially forever? What Mr. Altman does there is he confuses content moderation with content generation. They are not the same.

If the Court, however, were to proceed to take a look at what we actually published, there are four statements. Those four statements are contained in paragraphs 256 to 258, I believe. As to each of them, your Honor, they are widely protected. In fact, Mr. Altman has to quote out of context and essentially torture the words to even come up with a defamatory meaning.

I'm going to go through those very, very briefly and do so in light of this Court's own decision in which you approvingly on page 60 quote Chapin, saying, "Questions are not necessarily accusations or affronts, nor do they necessarily insinuate derogatory answers. They may simply be, as they are here, expressions of uncertainty."

Mr. Biro claims that what is false and defamatory in paragraph 256 is "a long history of purported fraud and manipulation of artworks he was employed to restore." What he ignores is the beginning of that sentence, your Honor. I'm holding up a little thing that is the beginning of the sentence, which is, "But Grann quickly began to find cracks in Biro's story and traces a long history of," and so on and so forth, entirely ignoring the context, entirely ignoring the fact that we are only saying here is what Mr. Grann said, and posing, by the way, precisely the kind of statement that the Court in its earlier decision here has found protected.

Similarly, in paragraph 257 he says that it is false and defamatory and the plaintiff has never planted any fingerprints on anything. How does that actual sentence begin? It says, "At the end of this tangled yarn comes a striking accusation: Biro had actually planted many of the fingerprints," merely suggesting that is the accusation contained in The New Yorker piece.

By the way, similarly with 258, the statement that plaintiff is, "Using technology to manufacture masterpieces is tantamount to an accusation of forgery, studiously ignoring the fact that that begins by saying, quote, depending on who you ask, he's either using fingerprinting, forensic science, and state of the art spectral cameras to undercover lost art masterpieces or, using that same technology, to manufacture them."

Essentially, your Honor, all this piece does, it's all protected opinion. The sources are very, very clear. They are all contained within the statements. All it does is pose the question posed in the headline of the piece itself, which Mr. Biro also objects to, through counsel, which is the following question: "Is this man the art world's high-tech hero or villain"?

Your Honor, you have already made clear that the posing of these sorts of questions is entirely protected. Should you even get to those questions, I think you will comfortably find that none of these are defamatory, but I suggest it all falls clearly on the statute of limitation calculus. Thank you.

THE COURT: Thank you.

Mr. Altman, would you like to respond?

MR. ALTMAN: Yes, just briefly.

THE COURT: What is your answer on the statute of limitations point?

MR. ALTMAN: The question on a republication starting the statute of limitations anew is whether the publication is intended for a new audience. This is what the Rinaldi case said: When, despite the fact that the book was not really changed, a paperback edition of a hard cover book was actually a republication because it was intended to reach a different audience.

THE COURT: Do comments on the website suggest any new audience?

MR. ALTMAN: The question about reposting of websites, which the first case deals with, the question there was posed whether the posting was substantially different. There they found that it was. To me, speaking frankly, I think it is an open question whether comments posted by somebody else should constitute that substantial difference.

It is a new publication because it did attract a new audience. The comments on the republication were far more vicious and nasty than the comments on the first publication. So there was a new audience that was being attracted or was responding. I think for that purpose it's a republication.

I also think certainly at a minimum we have some factual issues here as to when all these things were first published, the history of them, the history of the comments. Both the Firth case and the Rinaldi case say that whether a particular event constitutes a reissue or republication so as to give rise to a new cause of action with a new limitations period is frequently difficult to determine depending on the facts of each particular case.

THE COURT: When you talk about a republication, are you merely talking about the date when you printed out the article that had new comments?

MR. ALTMAN: Not the date when I presented it. The date when it was first published.

THE COURT: You mean the republication of the Gizmodo article?

MR. ALTMAN: That's right. I think it was the defendant's burden here to lay out that time scale, and I don't think they did. I think he had to really set out the first date of publication. There are other sites that I found during my searching on this. I don't know what the original dates were, but it is the defendant's burden to show that, to clearly establish that I'm time-barred.

I think the republication, whether the additional comments, the new comments on the republication constitute a material addition is a question of law. I think it is because clearly there were new people reading this and there were new people who were commenting on it. To that extent I think a different audience was being attracted.

I think the statute of limitations issue is a factual one, and they haven't proven it at this point. Perhaps we could have some limited discovery on that issue, failing which it should just be denied as a defense.

Frankly, there is a point at which raising questions becomes factual assertions, and I think it has been crossed here. Again, we have the republication of what The New Yorker said, tracing a long history of purported fraud and manipulation of artworks he was employed to restore. There is not a long history that is alleged in the first place.

Secondly, he was not accused of planting many fingerprints, he was accused of planting one. And it goes beyond the article. It is either actionable as a republication of what The New Yorker said -- it is certainly not opinion. It is simply The New Yorker said this, therefore, since The New Yorker is so wonderful, it must be true, and that's why we are republishing it. I'm sorry, that's not how these things work. I think that their motion should be dismissed.

MR. FEIGE: Can I respond very briefly, Judge?

THE COURT: Sure.

MR. FEIGE: First of all, the plaintiff has the process wrong and the burdens wrong. We have established a prima facie case of the statute of limitations violation. Then it is up to him. In fact, the very case he cites indicates that we are not required to negate any exceptions that might be applied.

I want to talk about Rinaldi for just a second, since it is what plaintiff here relies on. I also want to address very briefly this idea that somehow out there there are other websites. I'm not going to belabor it. It's all in the brief.

The very things that plaintiff cites have publication dates stamped on them. They are all published at the same time in different time zones. What he makes of that, I have no idea. But it seems to be the basis of some fanciful notion that somewhere out there there may have been a republication. He hasn't shown that there wasn't one. In fact, the very papers he attaches demonstrate that.

In terms of Rinaldi, your Honor, it's a 1981 case, something that, as I point out in the brief, was at a time where it was designed to talk about books, paper books versus hard cover books, not the Internet, not now. It involved printing presses and printing trucks, and so on and so forth.

In fact, adding comments to a website is not at all like printing a paperback. It's more like handing a book to your friend saying, oh, check this out, it's present interesting, or some such other nondefamatory comment. It doesn't constitute republication. The logic of all the cases, Firth included, makes that abundantly clear.

In fact, the extent to which plaintiff suggests that somehow the commentary colors the initial publication even though they are precisely the same, it is literally the same thing as like drawing a picture on a book or adding your own comment and handing it off to somebody else. They didn't generate additional comment. It didn't affect the initial piece, which he concedes was the same. Thank you.

THE COURT: Thank you.

Ms. Polebaum. Your motion is on behalf of Ms. Johnson.

MS. POLEBAUM: Ms. Johnson is a respected art critic who expresses her opinions on artists and other happenings in the art world in her personal blog as well as in various print publications. By this lawsuit plaintiff seeks to chill the expression of Ms. Johnson's opinion based on threadbare allegations of defamation by implication.

Plaintiff relies on strained inferences that are not reasonably implied nor adopted nor endorsed by Ms. Johnson. Even and even if the statement were susceptible to the reading plaintiff applies to them, they would still be protected as an expression of Ms. Johnson's opinion based upon fully disclosed facts.

First I'm going to address the two alleged defamatory implications in plaintiff's complaint and why they are not actionable, and then I will address plaintiff's lead contentions in his opposition.

First, the two alleged implications in plaintiff's complaint are not actionable, for three main reasons. As your Honor knows, two elements have to be met, and neither is. First, neither of the implications is reasonably conveyed. Second, she certainly does not affirmatively adopt or endorse them, and indeed plaintiff does not even allege that she does so in his complaint. Finally, even if they were conveyed and adopted and endorsed they would be protected opinion.

The first implication that plaintiff alleges in paragraph 268 of his complaint is, "Ms. Johnson's post is false in that it implies that plaintiff's statement that his reputation was his livelihood was unwarranted." It's unclear how this could even be a false statement of fact.

First of all, Ms. Johnson to where says that his reputation is unwarranted or should not be his livelihood. She doesn't even opine on his what his reputation is at all.

Second, there is certainly no language of adoption or endorsement of such an implication, and indeed plaintiff doesn't point to any in his complaint. All he says in his opposition is the fact that she characterizes the portion of The New Yorker article that she excerpts as "pretty damning words." He says that that is an adoption or endorsement. But characterizing something as "pretty damning words" doesn't indicate agreement with those words. It is insufficient to show that she intended to adopt that implication.

But even if Ms. Johnson had affirmatively stated that plaintiff's reputation should not be his livelihood, this would be a classic example of an opinion, particularly in the context of her post, under Gross and all the other cases. Such a notion is entirely objective subjective, it doesn't have a precise meaning. It's not as though Ms. Johnson describes and defines his reputation in a particular way and then says it is unwarranted. It is not capable of being proven true or false.

The entire context of the post also signals that it is opinion. The first sentence of her post says," The New Yorker's 'Mark of a Masterpiece' tells me it is time to reevaluate a couple of opinions I expressed about that so-called Jackson Pollock I wrote about back in 2006." She also uses other signals in her post to indicate that anything she is saying is opinion: Why I thought this, it seemed this way, I did this.

Also, the broader social context of her post also indicates that it's an opinion. It's a blog. It's not a newspaper article. This post is in the opinion section of her blog. Again, she is writing about a topic with open questions, as many people have discussed.

Finally, any implication that his reputation is unwarranted is not based upon any implied or undisclosed facts. So it is entirely protected opinion.

The second implication that plaintiff alleges in paragraph 269 is that a sentence in the first paragraph of Ms. Johnson's post implies that plaintiff is a forger. Here is a passage. "So I pushed aside a few pesky details, namely, that it followed the basic rule of forgery. The less plausible the fake, the more involved in the narrative and documentation becomes. This one reached absurd levels."

Plaintiff says that this passage implies that he is a forger and forged fingerprints. That is not reasonably implied from her post. All she is saying is that the Horton painting, "followed the basic rule of forgery," meaning that it had a long and involved narrative.

Plaintiff's position that it refers to him is not a reasonable reading. If you look at the surrounding sentences, it is clear that she is referring to the Horton painting. Indeed, when she describes the long and involved narrative and documentation, she refers to "truck driver Teri Horton's fake thrift store find." That could only refer to the painting, it couldn't refer to plaintiff or plaintiff's evidence.

Then to go from her statement that the Horton painting followed the basic rules of forgery to the implication that therefore plaintiff himself is a forger adds too many steps. It adds an entirely new thought. It is not reasonable.

Second, again plaintiff does not allege that she intended or endorsed such an implication. There is no allegation in his complaint that she did. Again, all he points to in his opposition is this notion that The New Yorker article has pretty damning words.

First of all, the fact that she characterizes The New Yorker article doesn't have anything to do with her own words or this passage, so it is separate. Second, again saying those are pretty damning words does not constitute an adoption or endorsement.

Finally, even if she had implied that plaintiff was a forger, which she didn't, and even if she had adopted or endorsed that, it would in this context be purely speculation, hypothesis, or own personal surmise under the Second Circuit in Levin. Under Gross such speculation would be protected opinion.

Finally, plaintiff doesn't challenge any of the underlying assertions in the passage as false. As your Honor's own opinion explained, that is another reason that it is protected opinion.

Again reading the post as a whole, no reasonable reader could conclude that she is asserting a provable false factual assertion that plaintiff is a forger. At most she would be speculating.

Finally, I want to address two points in plaintiff's opposition. First, plaintiff makes an entirely new contention that Ms. Johnson republished a false statement of fact in the excerpted portion of The New Yorker article. First, this is not in his complaint against Ms. Johnson. It is too late for him to assert it now. As the Court said in Chapin, "These paragraphs were not labeled as false in the complaint and plaintiffs may not belatedly rely on them."

Second, he never asserted that any of the excerpt that she reposted was false as against The New Yorker in any of his complaints or at oral argument. And as your Honor found only four statements potentially defamatory, the one he now picks on was not one of those four. So, as The New Yorker cannot as a matter of law be held accountable for this statement, to hold Ms. Johnson accountable would be contrary to your Honor's opinion.

Finally, even if the Court wanted to consider this statement, it's not actionable, because it is just a characterization of facts that plaintiff himself stated. The sentence that plaintiff picks on in the excerpted portion is the following. "To Hanley, this was baffling. What forensic scientist avoids peer review and even admits to doctoring evidence in order to prevent others from evaluating it"?

Plaintiff quarrels with this and said he didn't each admit to doctoring evidence. But it is clear in the context of this post that this reference to doctoring evidence is referring to a paragraph right before, which is an excerpt of plaintiff's own words in his own online report, which says, I'll read it briefly.

"For security reasons, several images in this report are water marked in a way that is not apparent to the observer. The fingerprint images have also been reduced in resolution so as to render them unusable except for illustration. I advised against evaluating the fingerprint images illustrated in this report as if they were the actual source material. Any attempt to do so is pointless."

Then we have the sentence that plaintiff picks on. "To Hanley this was baffling," it was baffling that plaintiff would do this. "What forensic scientist avoids peer review and even admits to doctoring evidence?"

It is clear that in the context the doctoring of evidence refers to the watermarking, the reducing of resolution, and the rendering of fingerprints unusable for illustration. It's just a characterization and it is protected opinion.

THE COURT: Do you also argue about insufficient pleading of actual malice? Do you make that argument as well?

MS. POLEBAUM: We do make that argument, yes. I can address that really briefly.

All that plaintiff says in his complaint is that Ms. Johnson acted with actual malice. The only thing he points to is her refusal to retract. As Mr. Schulz already argued, such conduct is irrelevant, and none of the cases that plaintiff cites stand either for the proposition that refusal to retract is sufficient to plead actual malice or that it could be evidence without more of actual malice.

And it is not sufficient to plead actual malice such that it wouldn't make any sense, as we argued in our brief. If that was a rule, then a plaintiff could just sue, demand a retraction, if the person didn't retract, plead actual malice. It's not the rule and it should not be. So plaintiff has not pled actual malice with respect to Ms. Johnson. Plaintiff also has no good-faith basis to believe that Ms. Johnson acted with actual malice.

Then I want to address this. It may not even be necessary. Plaintiff also argues that his claim is not one for a defamatory implication but is one for straight defamation. He says that in the beginning of his opposition.

First of all, he can't amend his allegations in his opposition. We cite the Court to that point in our brief. But more than important, he then doesn't point to any actual false assertions that she actually makes. The best he can do is on page 5 of his opposition when he says that she states or implies that he is a forger. But she nowhere states that. He is essentially conceding that his allegations are only for implication.

Maybe he is trying to save his claims because he realizes that his claims for defamatory implication don't have any merit, but he must meet the standards for defamatory implication. His complaint only alleges that she implies certain things, not that she states any factual assertions that are false.

That's it.

THE COURT: Thank you.

Mr. Altman, would you like to respond?

MR. ALTMAN: Just briefly. I think the central statement here is "I pushed aside a few pesky details," namely, that it followed the basic rule of forgery: The less plausible the fake, the more involved the narrative and documentation.

Apparently, this comes out of the Horton documentary. If you watched the documentary, as I did, it seems to me a reasonable person can say I don't agree. Mr. Spencer, the lawyer, said I don't agree. Mr. Hoving said I don't agree. Or the fingerprints don't match or that this methodology is flawed or it's just not a Pollock. That's fine. Obviously, those are opinions.

But to say it follows the basic rule of forgery, I don't think that there is a difference between saying that and saying he's a forger. If you want to parse it, ultimately that's what your decision on this motion will be. I think it is certainly susceptible of a defamatory connotation. To say that what somebody did followed the basic rule of forgery, I think that's an accusation of forgery. I don't think it is an opinion, and I don't think that it gets you off the hook. I think it is a clear accusation and that therefore it is actionable.

The business about Mr. Biro masking the fingerprints or not revealing them, he doesn't have a public obligation to reveal anything. Again, he's working for a client. It's his work product. He can do what he wants with it. He doesn't have to prove it to anybody's satisfaction except the satisfaction of his client. If somebody else wants to attack him for that, fine, let them attack him. But to go beyond that and to say that because he wouldn't share his work, he has some obligation to submit his work to peer review, I think that is a step too far.

As for the malice issue, I think we have already addressed it sufficiently. I don't think this motion should be granted. I think it should be denied.

THE COURT: Thank you.

MR. ALTMAN: Thank you.

THE COURT: The final motion is on behalf of Yale University Press. Mr. Abrams, if you would like to address that.

MR. ABRAMS: Good morning, your Honor. I represent the Yale University Press with respect to a biography that it published not of Mr. Biro but of Jackson Pollock. I have already submitted to the Court as Exhibit 1 to my affidavit chapter 10 of that book, which contains the three lines that plaintiff has claimed were libelous. I would like to furnish the Court with the whole book, if I may, just for the ease of the Court.

MR. ALTMAN: Do you have one for me?

MR. ABRAMS: I don't have the whole book. I have my Exhibit A.

As the Court will see on page 1, this is part of a series of books published by the Yale University Press called Icons of America, a series of short works written by leading scholars, critics, and writers telling the story of an American history and culture through the lens of a single iconic individual. The individual that this book is about is Jackson Pollock.

I start with the book because I think I can skip over one of the elements of the argument that has been put before you. I agree with Mr. Schulz and the argument that he has made with respect to the obligation of plaintiff to prove actual malice, and I accept the argument enthusiastically that plaintiff is a public figure.

But he doesn't have to be a public figure. The law is quite clear that with respect to a book publisher, a book publisher has no independent duty to investigate an author's story unless the publisher has actual subjective doubts as to the accuracy of the story. That is the language, the language I just used, from Judge Chin in the Stern v. Crosby case, which in turn cites many other cases.

Even if we weren't dealing with a public figure or a limited-purpose public figure here, plaintiff would still have to prove actual malice. One looks to his complaint to see what he has had to say about that. Only two paragraphs deal with it, paragraph 284 and 285.

The first of them says, quoting, that the Yale University Press "knew or should have known that many of the statements in the article are false." There is nothing else in this complaint that ties in any way the biography of Pollock to the article. There is no allegation in the complaint that there is a connection between the article and the book. And the book says nothing about the article, nothing about The New Yorker at all.

There is no support, none in the complaint beyond just those buzzwords "knew or should have known," for the proposition that there is any evidence that the author of the book, Evelyn Toynton, had any animus or knowledge of falsity, absolutely none -- she is not a party -- absolutely none, or that the Yale University Press did.

Paragraph 285, the only other paragraph that speaks to actual malice, again using the same sort of breezy language, says that the Yale University Press "knew or should have known of the existence of this action." With all respect, that has nothing to do with anything.

First, there is no support for the proposition that they should have known or did know of the existence of this action. But more broadly, supposing they had, there is no support. There is nothing in the law which says that if you know that there is some sort of action pending, therefore you should conclude that you may not say anything critical of one of the parties who has brought the action.

The only thing of relevance in this book to this action is that that part of chapter 10 which begins on page 109, and that is the material that starts with the proposition that there had been extensive coverage of the controversies surrounding the discovery in unlikely places of what were claimed to be previously unknown Pollocks.

The book then goes on, and after a paragraph winding up with a reference to an article that was not written by The New Yorker, using the three lines that are the basis of the case, which starts with the proposition "that a purported forensics expert with a specialty in art claimed to have found a Pollock fingerprint on Horton's painting, though his integrity was later called into doubt and the validity of his methods questioned by a fingerprint expert of longstanding."

Plaintiff has pled all of that. Plaintiff's paragraphs 33 and 39 say as clearly as one could that it is plaintiff's case in fact that his integrity was called into doubt and his methods questioned.

The next sentence as well. "There were even allegations that the fingerprint had been forged, transferred onto the painting via an inked rubber stamp made from a cast of a Pollock print on a paint can." Plaintiff does not deny that those allegations were made. Again, that is part of his case.

It's only when you get to the third sentence that plaintiff has something which moves away from that which he has already acknowledged, and that is the line, "When the same forensic expert announced he'd also found a Pollock fingerprint on another disputed Pollock, it was hard to take him seriously." Plaintiff says that that is the basis or a basis for his claim.

On the actual malice level, he says nothing about that, literally nothing about it. But beyond that, on the level of whether that is defamatory, we have had the good fortune of finding a New York State case, the Jaszai, v. Christie's case, involving, as it happens, an art expert about whom the nearly identical language was used.

In that case somebody said, "I have no reason to take this man seriously." Initially, in the New York supreme court across the street, Justice Gammerman said that could be actionable. He was reversed on that by a unanimous Appellate Division in an opinion saying that that very language, the language involved in our case, was so vague, "vague, ambiguous, and entirely in the eye of the beholder," that it could not be the basis of a claim of libel.

What we have here, then, is a claim about two sentences that are undeniably true, the allegations were made, and one sentence which has been definitively held by a New York appellate court to constitute "pure opinion" protected by the First Amendment. On that basis we think there is nothing to be said in support of this complaint and ample bases, on more than one ground, to dismiss it.

There are no facts supporting knowledge of falsity. To the extent counsel is arguing that they should have had knowledge, I think it is common ground by now that that can't state a claim when actual malice is required. The "should have known" element can't begin to meet the burdens of the actual malice test. On the truth side and on the is it defamatory side, the first sentences are true and the last is nondefamatory.

I close with this. If one reads on just a bit, on page 109 and 110 and then on to page 111, the book makes clear that it is not taking a position as to the truth or falsity of whoever is being talked about here, this purported forensic expert. I'm prepared for purposes of our discussion here on this to assume it is Mr. Biro, even though he is never even mentioned.

The book says, "Neither dispute has yet been conclusively laid to rest" -- one of those is this very dispute -- "and it is certain that there will be other controversial Pollock discoveries in the future. Whether they will be resolved by scientific analysis or by the aesthetic judgment of those whose longstanding involvement with Pollock's work make their instinctive responses particularly trustworthy is not yet clear. In both cases the problem of establishing authenticity and the differing conclusions arrived at by respected scholars and connoisseurs, not to mention the scientists involved, highlighted the particular difficulty of authenticating the kind of work Pollock produced."

It is our view that all else aside, this is not defamatory, it is not untrue, and there is no basis for finding actual malice.

Thank you, your Honor.

THE COURT: Thank you.

Mr. Altman.

MR. ALTMAN: Once again, we have the republication of what was in The New Yorker article. What's interesting is that the denial that Mr. Biro is a forger is even in the article itself. And I say so in the complaint. Paragraph 129 quotes from the article in The New Yorker.

It says, "When I asked Biro about the allegedly forged fingerprints on the Parker's painting, he peered intently at his glass of wine. I suddenly noticed how blue his eyes were. Calm again, he denied that he had ever forged a fingerprint." So, The New Yorker admits that Mr. Biro denied, not admits. They state his denial of ever forging a fingerprint.

THE COURT: That's in the article.

MR. ALTMAN: Yes.

THE COURT: What about the point that this passage from the Yale book doesn't actually cite The New Yorker article?

MR. ALTMAN: It doesn't have to. I noticed that Mr. Abrams didn't get into the of-and-concerning argument. I think it is disingenuous, frankly, to raise it. It's not that the general public has to know that this is Mr. Biro but simply that anyone who knows Mr. Biro would read this and recognize this as referring to Mr. Biro. I think we don't have an issue about that. There is no question and this is of and concerning Mr. Biro even though he is not named.

The point here is that this passage, and in particular it's on 110, I think the point here is that it is in the passive voice. It's really trying to avoid making a direct accusation. But I think the inference is clear: His integrity was called into question.

By whom is my question. The validity of his methods was questioned by a fingerprint expert of the longstanding. Who is that? Who made the allegations that the fingerprint had been forged? Actually, it was The New Yorker who made the allegations, repeating the allegations of other people.

THE COURT: But if the other people in fact made the allegations, where is the defamation?

MR. ALTMAN: Then you become a republisher. You can't republish a libel just by saying I read it in The New Yorker so it must be true. If it is an opinion, if we grant Mr. Abrams' argument that it is just an opinion, it is based on undisclosed facts. Where are the undisclosed facts?

THE COURT: He says the first two are factual statements and the third sentence is the opinion. The first two are simply that an allegation was made of X, not --

MR. ALTMAN: But the facts upon which this opinion is based, the reader doesn't have to make reference to the extrinsic facts which support this opinion. It's the responsibility of the speaker to set forth the facts upon which that opinion is based.

In a sense this is like saying if you knew what I knew, you would agree with me that Biro is a forger. This is the problem with this statement. It's either directly a statement, republishing a statement, that Biro is a forger or it's an opinion that Biro is a forger based upon facts which aren't here. That's what I think the problem is with this statement and that's why I think that this statement is actionable.

MR. ABRAMS: May I add just one thing?

THE COURT: Yes.

MR. ABRAMS: Mr. Altman seems to think that if one person says something or writes it and then another party says it or writes it later on, that's republication. That's not what the republication doctrine is about. The republication doctrine came from the motion of newspapers or others saying something and it being literally or nearly literally reprinted, by someone else, saying The New York Times said it. This is the opposite of that. There is no republication here.

I have to say that there is also no doctrine of law, no case, in which what Mr. Altman refers to as the passive voice transforms protected speech into unprotected speech. You asked him about what was in the article, the book, about The New Yorker, and he answered you in terms of whether it was of and concerning. We make an of-and-concerning argument, and I'm prepared to rest on the brief on that.

The fact is there is nothing in the book about The New Yorker. The book makes no claim that they have learned something, the author has learned something from The New Yorker. It would still be protected speech if she had, but that is not what this article is like. It's not a republication of anything. It is an articulation by an author of claims made, claims denied, and ultimately taking no position on the validity of the claims.

Thank you, your Honor.

THE COURT: Thank you.

I think that covers all the motions. Is that right? Yes. Thank you all very much. This is helpful. I'll be taking it under advisement and ruling shortly.

(Adjourned)